courts allow rescission after the passage of title as freely for the breach of an implied as of a collateral warranty.

Again, in order to show that cases allowing rescission cited by Professor Williston as supporting the Massachusetts rule and opposed to the English rule would have been similarly decided in England, Professor Burdick was contented in his article merely to point out that the warranties were conditions under the Sale of Goods Act, or "vital, not subsidiary promises." 4 Columbia L. Rev. 6, 7, notes 3 and 5. But if before the passage of title rescission is allowed for breach of a collateral warranty as well as for breach of a condition, as Professor Burdick impliedly asserts on page 5; and if the breach of a condition does not necessarily operate to prevent the vesting of title, a suggestion which he expressly repudiates in 4 Columbia L. Rev. 265, then it is hard to see the sufficiency, or even the pertinence, of the distinction unless on the basis that the breach of a condition makes rescission allowable even after passage of title.

But it appears from the above communication, and indeed it is specifically stated in a second and more recent article by Professor Burdick in 4 Columbia L. Rev. 265, replying to an answer to his first paper published by Professor Williston in 4 Columbia L. Rev. 195, that Professor Burdick agrees that the issue is "whether rescission of an executed sale is allowable for breach of a promise, whether collateral, part of the description, or wholly implied."

The question in regard to the cases in dispute seems to have become now merely whether in those cases title had been finally accepted at the time when rescission was sought, or whether possession had been taken merely for examination. The individual cases have been carefully analyzed in this regard by Professor Williston and Professor Burdick in the March and April numbers respectively of the Columbia Law Review, to which the reader is referred.

Professor Burdick's protest against the citation of cases in the previous note in this Review deserves attention, though collateral to the main issue. It must be admitted that *Polhemus* v. *Heiman* stands for rescission only by a *dictum*. *Pacific, etc., Co.* v. *Mullen* was cited as a case where it was indubitable that title had passed, and yet rescission was allowed. The plaintiff was not permitted to recover in an action brought for the price of the goods. It is true that the same result would have been reached in England on the basis of recoupment, the guano being worthless; but the court places its decision on the ground of rescission, not of recoupment. The requirement that the goods be returned as a condition precedent to the right of rescission is probably in Massachusetts as elsewhere where rescission is allowed subject to an exception when the goods are valueless. See *Perley* v. *Balch*, 23 Pick. Mass. 283, 286. The case, therefore, would have been similarly decided in Massachusetts on the same reasoning, whereas the result would not have been reached in England except on totally different grounds.

DEGREE OF CARE TO BE EXERCISED BY A GRATUITOUS BAILEE. — The nature and extent of a bailee's liability in gratuitous bailments is not fully explained by the text writers nor clearly set forth in the cases. On the one hand, there is the rule, at least nominally established, that a gratuitous bailee is liable only for gross negligence, the application of which is discussed to a very limited extent in a recent article. *Degree of Care to be Exercised by a Gratuitous Bailee*, Anon., 58 Central L. J. 181 (Mar. 4, 1904). On the other hand, it has been forcefully contended that a gratuitous bailee is held to such a degree of care and exertion in the business as he in fact undertook to bestow. See 5 HARV. L. REV. 222.

It must be admitted at the outset that the rule first stated is in itself no test of a bailee's liability. Negligence is a breach of some duty. The duty which the gratuitous bailee owes to his bailor arises, not from any contractual relation between the parties nor from their relation as members of society, but solely from the new relation in which they have been placed by the voluntary under-

taking of the bailee. *Cf.* 17 HARV. L. REV. 126. Although it is clear that the undertaking primarily gives rise to the duty, a more uncertain phase of the question is encountered in considering whether the extent of that duty is to be determined likewise from the undertaking itself, or by certain established rules of law. Whenever an explicit understanding exists between the parties, the extent of the bailee's liability may indeed be determined from his undertaking, but in the absence of any such understanding it is hard to believe that he does in fact undertake to bestow any particular degree of care. Even a mutual understanding, if it be to the effect that the bailee shall not be liable for negligence, would not excuse him from the exercise of proper care. *Lancaster Co. Nat'l Bank* v. *Smith*, 62 Pa. St. 47. Furthermore, where both parties mistakenly believe that the liability of the bailee is absolute, it can scarcely be contended that he ought thereby to be placed in the position of an insurer. It would seem, therefore, that, in order to determine the extent of a bailee's liability in certain cases, one must go beyond the actual undertaking and consider what care the law requires of him in performing the duty which he has undertaken. This depends upon the nature of the bailment. In case of a loan for the benefit of the bailee great care is required, in case of a bailment for hire for the benefit of both parties ordinary care is required, and in case of a deposit for the benefit of the bailor slight care is required. It may be said that these three degrees of care in ordinary bailments, having become crystallized into rules of law in much the same way that the absolute liability of the common carrier has become established, determine the extent of the bailee's liability in all cases in which it either cannot or ought not to be determined from the actual undertaking.

Although the courts still continue to speak of the gratuitous bailee as being liable only for gross negligence, gross negligence seems to mean nothing more nor less than ordinary negligence. Various judges have in fact protested against the use of the term "gross" in this connection. See Baron Rolfe in *Wilson* v. *Brett*, 11 M. & W. 113. In whatever way the extent of the gratuitous bailee's duty may be determined, it must be clear that he is liable for any negligence arising from a failure to properly perform that duty.

ASSIGNMENT OF LIFE INSURANCE POLICY TO ONE WITHOUT INSURABLE INTEREST. — It is well settled in life insurance law that a policy issued to one who has no insurable interest in the life insured is void as a wagering contract. An early English case, proceeding upon the theory that life insurance is a contract of indemnity like property insurance, required an insurable interest at the time of loss. *Godsall* v. *Boldero*, 9 East 71. But this theory was repudiated in a later case where a creditor's interest ceased before the death of the debtor whom he had insured. *Dalby* v. *India, etc., Co.*, 15 C. B. 365. See also *Connecticut, etc., Co.* v. *Schæfer*, 94 U. S. 457. On the further question whether a valid policy may be assigned to one who has no insurable interest, there has been more dispute, but the tendency seems to be to hold such an assignment valid. *Mutual, etc., Co.* v. *Allen*, 138 Mass. 24. The authorities are collected in a recent article. *Validity of Assignments of Life Insurance Policies to Persons Having no Insurable Interest in the Life of the Insured*, by J. T. Ford, 58 Central L. J. 184 (Mar. 4, 1904).

The argument of the minority is, in brief, that an assignment to one without interest is simply an indirect means of getting a wagering contract and of giving to the assignee an interest in the death rather than in the life of the insured, — objects which the law considers against public policy when attempted directly. On the other hand it is argued that what public policy forbids is the obtaining of insurance on a life by a stranger, as distinguished from either the naming of a stranger as a beneficiary or the assignment by the insured of a policy to a stranger, in which case a man voluntarily gives to another an interest in his decease.

It would seem that the courts which have denied the validity of such assignments have been led to that result by considering cases which did not necessarily